TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 96

JOHN M. KOSSICK, PETITIONER,

vs.

UNITED FRUIT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1960
CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 21, 1960

[fol. A]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN M. KOSSICK,

Plaintiff-Appellant,

against

UNITED FRUIT COMPANY,

Defendant-Respondent.

On Appeal From the United States District Court
for the Southern District of New York

Appendix for Plaintiff-Appellant

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN M. KOSSICK, Plaintiff-Appellant,

against

UNITED FRUIT COMPANY, Defendant-Respondent.

STATEMENT UNDER RULE 15(b)

This action was commenced by the filing of a complaint on July 20, 1954.

An amended complaint was thereafter filed on June 6, 1958.

Issue was joined by the service of an answer to the amended complaint on June 12, 1958.

The defendant thereafter moved for an order dismissing the first cause of action of the amended complaint, which motion was granted by Hon. Alexander Bicks on September 10, 1958. The second cause of action was discontinued without costs and without prejudice on November 20, 1958.

A judgment was thereafter entered on March 31, 1959, dismissing the complaint. A notice of appeal was duly filed by the plaintiff from that judgment on April 16, 1959.

There has been no change in the plaintiff or his attorney since the commencement of this action.

The attorney for the defendant at the commencement of this action was Thomas H. Walker, Esq.

At present the attorneys for the defendant are Burlingham, Hupper & Kennedy, Esqs.

[fol. 2]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMENDED COMPLAINT—Filed June 6, 1958

Plaintiff, for his amended complaint, by his attorney, respectfully states and alleged upon information and belief, as follows:

FOR A FIRST CAUSE OF ACTION:

First: That at all the times hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and duly licensed to do business in the State of New York, maintaining a principal place of business within the jurisdiction of this Court.

Second: That at all the times hereinafter mentioned, the plaintiff was a citizen of the United States residing within the State of New York.

Third: That the plaintiff is suing for a sum of money in excess of Three Thousand ($3,000.00) Dollars, and as appears by the foregoing, there is diversity of citizenship between the parties hereto, this Court has jurisdiction of the above entitled matter.

Fourth: That at all the times hereinafter mentioned the plaintiff was in the employ of the defendant in the capacity of a Chief Steward, by reason of which fact the defendant was under an implied contractual duty to pro-
[fol. 3] vide the plaintiff with prompt, adequate and proper medical and surgical treatment and nursing care, as well as the reasonable expenses of hospitalization, maintenance and cure.

Fifth: That the plaintiff suffered injury, ailment and illness while in the employ of the defendant herein, for which conditions the plaintiff was entitled to treatment without expense to him and at the expense of the defendant herein in the event there was no United States Public Health Service Hospital available where such treatment

might be received, that there was and is available without charge, on request of a shipowner, as well as under other circumstances.

Sixth: That after suffering the injury, ailment and illness as aforesaid, the plaintiff engaged the services of Dr. Robert Edward Frick of 445 West 23rd Street, New York, N. Y., to treat said plaintiff for the conditions from which he was suffering.

Seventh: That the plaintiff had made all necessary arrangements for medical and surgical and post-operative care by Dr. Frick for the agreed price of $350.00.

Eighth: Plaintiff duly demanded of the defendant that said defendant provide the necessary medical and surgical care and treatment and make arrangements for future nursing care and treatment.

Ninth: Plaintiff duly informed the defendant that he, the plaintiff, was not satisfied to receive treatment at the United States Public Health Service Hospital, as he, the plaintiff, did not believe that he would receive prompt, adequate and proper treatment at said institution. The plaintiff further informed the defendant that he, the plain-
[fol. 4] tiff, had had several experiences at said hospital and that he, said plaintiff, knew of his own knowledge and by reason of his personal experience that his health would be jeopardized and that he would not receive prompt, adequate and proper treatment and nursing care at said hospital, as said hospital was overcrowded, undermanned and had several people who were not sufficiently trained, nor had the adequate experience to properly take care of the great number of patients attending said hospital. Plaintiff further informed the defendant that he had experienced such lack of concern and interest on the part of the doctors and attendants who had treated the plaintiff in the past, that he was convinced that that hospital was not the place where he, the plaintiff, would receive such medical, surgical and nursing care, that would be of any benefit to him but on the contrary, that his condition might be worsened by his going to said hospital.

Tenth: That sometime before August 28, 1950, the plaintiff, informed the defendant that he had made arrangements with his attending Dr. Frick, aforementioned, for all the necessary treatment and postoperative care for the price of $350.00, which he, the plaintiff, was willing to pay.

Eleventh: The plaintiff requested of the defendant that provision be made for said plaintiff's maintenance and for the necessary expenses of medical and surgical aid and attendance, hospitalization and nursing care, suggesting the services of Dr. Frick aforementioned.

Twelfth: The defendant, although under a legal contractual obligation to provide the plaintiff with the necessary medical and surgical attendance, hospitalization and nursing care which the plaintiff would require, breached its implied contract to do so by an anticipatory breach consisting of its informing the plaintiff that said defendant [fol. 5] would not provide such care and treatment unless the plaintiff discharged his Dr. Frick aforementioned and in place thereof become a patient of the United States Public Health Service Hospital.

Thirteenth: The defendant in addition to breaching its contract aforementioned, agreed that if the plaintiff would discharge Dr. Frick, and would become a patient of the United States Public Health Service Hospital, that the defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital.

Fourteenth: That by reason of the plaintiff being without the means of continuing with the services of Dr. Frick and by reason of the tortious breach of contract of the defendant aforementioned in anticipatorily breaching its legal obligation to provide the treatment aforementioned, the plaintiff was deprived of the services of Dr. Frick and was forced to accept in lieu thereof, the services of the

United States Public Health Service Hospital, Staten Island, New York.

Fifteenth: That in addition to the tortious breach of contract aforementioned, the plaintiff gave up his right to be treated by his own doctor and relying on the agreement of the defendant to compensate the plaintiff for any damage he might suffer by reason of his discharging Dr. Frick and becoming a patient of such United States Public Health Service Hospital.

[fol. 6] Sixteenth: That as a result of the foregoing, the plaintiff did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on the 28th day of August, 1950.

Seventeenth: That following the 28th day of August, 1950 and his admission to the United States Public Health Service Hospital at Staten Island, New York, and on said date, the plaintiff was treated with an injection of iodine compound in concentrated form which destroyed and otherwise damaged various parts of the plaintiff's person, including his colon, anus and gluteal regions, necessitating surgical intervention for such condition. That all these parts of plaintiff's person had been perfectly healthy prior to the administration of the aforesaid dangerous, destructive and improper medication or drug.

Eighteenth: That as a result of said damage to his person, the plaintiff had to undergo multiple operations thereafter, including a colostomy on his left side of his body on the 22nd day of December, 1950, which subsequently became infected and necessitated a second cholostomy on the right side of his body on the 26th day of January, 1951.

Nineteenth: That by reason of the tortious breach of contract of the defendant in refusing to provide the plaintiff with prompt, adequate and proper medical and surgical treatment and nursing care, its breach of its contract to provide adequate maintenance and cure and by reason of defendant's agreement to compensate the plaintiff for any damage he would suffer and by reason of the fact that the plaintiff did suffer damages as a result of his discharging

Dr. Frick and becoming a patient of the United States Public Health Service Hospital, the plaintiff was caused to suffer injuries and disabilities, for which the defendant is liable in damages.

[fol. 7] Twentieth: That by reason of the foregoing, the plaintiff was caused to become totally and permanently disabled, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and plaintiff may be required to incur obligations for medical and surgical aid and attendance and nursing care, and plaintiff was otherwise injured all to his damage in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION

Twenty-first: Plaintiff repeats and realleges all of the foregoing paragraphs of the amended complaint with the same force and effect as if herein set forth at length, and in addition thereto alleges:

Twenty-second: That it was the duty of the defendant to provide the plaintiff with the expenses of his maintenance and cure.

Twenty-third: That the plaintiff became disabled as aforementioned, but the defendant failed, neglected and refused to supply the plaintiff with the expenses of his maintenance and cure, all to his damage in the sum of Thirty Thousand ($30,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant herein in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the first cause of action, and in the sum of Thirty Thousand ($30,000.00) Dollars on the second cause of action, together with the costs and disbursements of this action.

Jacob Rassner, Attorney for Plaintiff, Office and P. O. Address, 15 Park Row, Borough of Manhattan, City and State of New York.

[fol. 8]

#155

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—September 10, 1958

BICKS, D.J.

Presented on this motion, is the issue whether the first count in the amended complaint states a claim upon which relief can be granted.

Insofar as here material, the allegations thereof are, that: (i) plaintiff was in the employ of the defendant as Chief Steward; (ii) while so employed he "suffered injury, ailment and illness * * * for which conditions * * * [he] was entitled to treatment without expense to him and at the expense of the defendant herein in the event there was no United States Public Health Service Hospital available where such treatment might be received"; that such a Hospital was available; (iii) "after suffering the injury, ailment and illness as aforesaid", plaintiff prior to August 28, 1950 informed the defendant that he had made arrangements to engage the services of a Dr. Frick, a private physician of his own choosing "for all the necessary treatment and postoperative care for the price of $350.00, which he, the plaintiff, was willing to pay"; (iv) plaintiff informed the defendant that by reason of prior experiences at the Marine Hospital he did not believe he would receive prompt, adequate and proper treatment at that institution; (v) defendant would not provide the medical care plaintiff required except via the facilities of the United States Public Health Service Hospital; (vi) defendant "agreed that if the plaintiff would discharge Dr. Frick, and would become [fol. 9] a patient of the United States Public Health Service Hospital, that the defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his

discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; (vii) in reliance upon the aforesaid agreement plaintiff gave up his right to be treated by his own doctor and became a patient at the United States Public Health Service Hospital on August 28, 1950; (viii) medication was administered to the plaintiff at the hospital which damaged certain internal organs all of which "had been perfectly healthy prior to the administration of the aforesaid dangerous, destructive and improper medication or drug"; and (ix) plaintiff's damages, alleged to be in the sum of $250,000.00 are "a result of his discharging Dr. Frick and becoming a patient of the United States Public Health Service Hospital".

As appears, the first count is bottomed on contract and not on unseaworthiness or the Jones Act. This is not an oversight but rather a stratagem to resuscitate a claim time barred under the Jones Act. See 45 U. S. C. A. § 56; *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958); *Engel* v. *Davenport*, 271 U. S. 33 (1926); *Sgambati* v. *United States*, 172 F. 2d 297 (2d Cir.), cert. denied, 337 U. S. 938 (1949). The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application.

The sufficiency of the first count is attacked on two grounds, viz: (1) that the alleged agreement in suit is *nudum pactum* and (2) that it is void and unenforceable under the Statute of Frauds. Jurisdiction here is predi- [fol. 10] cated on diversity of citizenship. We look, therefore, to the New York law to test the validity of defendant's contentions.[1]

In support of its claim that the agreement lacks vitality for absence of consideration, defendant urges that absent benefit to itself, an undertaking which it was under no legal duty to assume is unenforceable. This position is so clearly untenable as not to merit extended discussion. See *Hamer*

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[1] For purposes of the *Erie-Tompkins* rule, sufficiency of consideration [*Pittsburgh Testing Laboratory* v. *Farnsworth & Chambers Co.*, 251 F. 2d 77 (10th Cir. 1958)] and applicability of Statute of Frauds [*Macias* v. *Klein*, 203 F. 2d 205 (3rd Cir.), cert. denied, 346 U. S. 827 (1953)] are "substantive."

v. *Sidway*, 124 N. Y. 538 (1891); *Weiss* v. *Weiss*, 226 App. Div. 801 (2d Dept. 1943); *Restatement of Contracts* §§ 75, 76 (1932). Benefit to the defendant or no, and relative value of a promise and the agreed consideration therefor, are not determinative on this issue. See *Mencher* v. *Weiss*, 306 N. Y. 1 (1953); *Walton Water Co.* v. *Village of Walton*, 238 N. Y. 46 (1924); *Hamer* v. *Sidway, supra; Restatement Contracts* § 81 (1932).

The second ground of attack—that the Statute of Frauds is a valid defense to the enforcement of the agreement—does not lend itself to the same summary disposition. N. Y. Personal Property Law § 31(2) provides:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;
>
> " • • •
>
> "2. Is a special promise[2] to answer for the debt, default or miscarriage of another person;
>
> " • • • "

[fol. 11] Absent a primary obligation, i.e., a duty on the part of one other than the party proceeded against, for which the said party undertakes to be answerable, the Statute of Frauds cannot be invoked, *Lilyan Realty Corp.* v. *Gottfried Baking Co.*, 49 N. Y. S. 2d 942 (Sup. Ct. 1944); 2 *Williston, Contracts* § 454 (rev. ed. 1936); *Simpson, Suretyship* § 35 (1950). The words "debt, default or miscarriage" as employed in the Statute embrace all types of primary obligations and duties recognized by law, 2 *Corbin, op. cit.* § 347; 2 *Williston, op. cit.* § 453; 37 C. J. S., *Statute of Frauds*, § 13; *Restatement, Contracts* § 180, comment b (1932); *Restatement, Security* § 89, comment b (1945); including liabilities sounding in tort. *Kahn* v. *Naitove*, 171 Misc. 504 (Sup. Ct. 1939); *Gibbs* v. *Holden*, 137 Misc. 480

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[2] A "special promise", within the meaning of the statute, is a promise made in fact as contrasted with a promise implied in law. 2 *Corbin, Contracts* § 347 (1950).

(Sup. Ct. 1930), aff'd mem., 237 App. Div. 862 (3d Dep't 1932); 49 Am. Jur., Statute of Frauds § 66.

Defendant's alleged undertaking, construed in the light most favorable to plaintiff, was to compensate him for all loss and damages that he might sustain by reason of any improper, inadequate or incompetent treatment received at the United States Public Health Service Hospital. The primary obligation to which this undertaking related, was the duty of the hospital and its employees, to exercise due care in treating plaintiff. Plaintiff urges, however, that since *at the time of the defendant's promise* (which was before plaintiff entered the hospital) the hospital was under no obligation or duty to him, the defendant's promise did not relate to an *existing* obligation of another and, therefore, was not required to be in writing to be enforceable. Although there once may have been some doubts as to whether the applicability of the statute was limited to guarantees of a subsisting debt, see *D'Wolf* v. *Rabaud*, 26 U. S. (1 Pet.) 476, 499-500 (1828), it is now clear that a promise to answer for the default or miscarriage of another comes within the purview of the Statute without regard to the time when made, vis-a-vis the principal obligation. *D'Wolf* [fol. 12] v. *Rabaud*, supra; 2 *Corbin, op. cit.* § 347 & n. 39; *Simpson op. cit.* § 35 at p. 126; 2 *Williston, op. cit.* § 461 at p. 1333; 49 Am. Jur., *Statute of Frauds*, § 89 at p. 444; 37 C. J. S., *Statute of Frauds*, § 14 at p. 521; *Restatement, Contracts* § 180 and comment b (1932); *Restatement, Security* § 89, illustration 2 (1941). "[N]o distinction appears to be made by the authorities between an agreement to pay an antecedent debt and indebtedness to be created subsequent to the promise." *R. & L. Co.* v. *Metz*, 165 App. Div. 533, 538 (1st Dep't 1914), aff'd mem., 215 N. Y. 695 (1915).

Plaintiff characterizes the defendant's alleged undertaking as an "original" promise and from that premise proceeds to argue that it is out of the statute. The use of the terms "original" and "collateral" is not very helpful because they are not clearly defined and owing to the ambiguity of these terms the *Restatement of Contracts*, §§ 180 et seq., avoids their use. 2 *Williston, op. cit.* § 463 (rev. ed. 1936). See also *Brown* v. *Weber*, 38 N. Y. 187,

190 (1868); 2 *Corbin, op. cit.* § 348; *Simpson, op. cit.* § 35 (1950).

Where the promisor comes under an independent duty of payment irrespective of the liability of the principal debtor and the undertaking is founded on a new consideration moving to the promisor and beneficial to him, the undertaking is said to be "original", whereas if it is to answer for the debt, default or miscarriage of another it is characterized as "collateral". In *Bulkley* v. *Shaw*, 289 N. Y. 133, 137 (1942) the Court of Appeals set out the test as follows:

> "The elements of beneficial interest and new consideration must be present to take the case out of the statute; *but the inquiry remains whether the consideration is such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor.*" [Emphasis by the Court.]

[fol. 13] There are two requirements each of which must be satisfied to take an oral promise out of the statute; first, the defendant's promise must be based upon a consideration which moves to the defendant and benefits him, and secondly, the defendant must be under an independent duty of payment irrespective of the liability of the principal debtor. See *Richardson Press* v. *Allbright*, 224 N. Y. 497 (1918); *White* v. *Rintoul*, 108 N. Y. 222 (1888); *Zweighaft* v. *Lang*, 194 Misc. 370 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 1017 (2d Dep't 1950); *Kahn* v. *Nadove, supra; Gibbs* v. *Holden, supra; Terminello* v. *Bleecker*, 155 Misc. 702 (N. Y. City Ct. 1935).

In order to satisfy the first requirement it is not enough to show that there was consideration for the promise because without a promise otherwise enforceable the question of the applicability of the Statute of Frauds is not reached. See *Bulkley* v. *Shaw, supra; Ackley* v. *Parmenter*, 98 N. Y. 425 (1885). The consideration moving to defendant must confer a direct and substantial benefit upon him. See, e.g., *Raabe* v. *Squier*, 148 N. Y. 81 (1895); *First National Bank* v. *Chalmers*, 144 N. Y. 432 (1894); *In Re Carlin's Will*, 201

Misc. 43 (Surr. Ct. 1951); *Smith* v. *Fredericks*, 146 Misc. 453 (Co. Ct. 1932); a mere detriment to or forbearance by the promisee, *White* v. *Rintoul*, *supra*; *Ackley* v. *Parmenter*, *supra*, or a moral or sentimental object, *Gibbs* v. *Holden*, *supra*, or slight and indirect possible advantages will not suffice. *Kahn* v. *Naitove*, *supra*.

It is difficult to perceive how the consideration moving to the defendant in the instant case could be deemed beneficial to it. A seaman who becomes ill in the service of his vessel is entitled to maintenance and cure, even though his ailment is not causally related to the employment. *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Rey* v. *Colonial Nav. Co.*, 116 F. 2d 580 (2d Cir. 1941). However, "[t]he seaman does not have a free hand in choosing his own physician and deciding on his own treatment." *Gilmore & Black, Admiralty* § 6-11 at p. 266 (1957). On the [fol. 14] contrary, it is settled law that an injured seaman who voluntarily rejects hospital care at a Marine Hospital[3] equipped to minister to his medical needs thereby forfeits his right to reimbursement from the shipowner for his hospital and medical expenditures. *Muruaga* v. *United States*, 172 F. 2d 318 (2d Cir. 1949); *Bailey* v. *City of New York*, 153 F. 2d 427 (2d Cir. 1946); *McManus* v. *Marine Transport Lines, Inc.*, 149 F. 2d 969 (2d Cir.), cert. denied, 326 U. S. 773 (1945); *The Saguache*, 112 F. 2d 482 (2d Cir. 1940); *The Bouker No. 2*, *supra*. When defendant tendered plaintiff a master's certificate (which plaintiff accepted and used) its obligation to furnish cure was discharged. See also *The Santa Barbara*, 263 Fed. 369 (2d Cir. 1920); *The Alpha*, 44 F. Supp. 809 (E. D. Pa. 1942). Plaintiff, as he admitted in answer to an interrogatory propounded to him, "was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hos-

[3] The courts take cognizance of the availability of the Marine Hospital service where seamen who present a "master's certificate" are entitled to treatment at a minimum expense or without charge. *Calmar Steamship Corp.* v. *Taylor*, *supra*; *The Bouker No. 2*, 241 Fed. 831 (2d Cir.), cert. denied, 245 U. S. 647 (1917). See also *United States* v. *Loyola*, 161 F. 2d 126 (9th Cir. 1947).

pital * * * " The consideration for defendant's promise, therefore, could not and was not intended to confer any benefit upon it.

Bulkley v. *Shaw*, *supra* at 138-39, the most recent decision of the New York Court of Appeals treating with the aspect of the Statute of Frauds here involved, "quoted with approval" the test suggested in 2 *Williston*, *op. cit.*, § 475, i.e., Is the new promisor a surety?:

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. *'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.'*" [Emphasis by the Court,]

[fol. 15] In the case at bar, as between defendant and those who negligently treated the plaintiff, the latter should bear the burden of making the plaintiff whole for the injuries allegedly suffered at their hands. See *Restatement, Security*, illustrations 3, 5 at pp. 225-26 (1941).

Although the defendant's promise to compensate plaintiff is alleged to have been absolute in *form* it is not by reason of that fact alone rendered original. See *Williston*, *op. cit.* § 467 at pp. 1348-49. The promise in substance is to answer for the default of another and must be in writing to be enforceable. "The ancient purpose of the Statute of Frauds was to require satisfactory evidence of a promise to answer for the debt of another person, and its efficacy should not be wasted by unsubstantial verbal distinctions." *Richardson Press* v. *Albright*, *supra*, at 502.

The New York Statute of Frauds precludes enforcement of the defendant's alleged oral promise. The issuance of the master's certificate to plaintiff and his use thereof to gain admittance to and utilize the facilities of the Marine Hospital did not constitute the shipowner an indemnitor against malpractice by or at that institution.[5]

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[5] But Cf. *Cortez* v. *Baltimore Insular Line*, 287 U. S. 367 (1932) (failure to provide cure held actionable); *Sims* v. *United States of America War Shipping Administration*, 186 F. 2d 972 (3d Cir.),

Motion to dismiss first count of the amended complaint is granted.

So ordered.

Dated: September 10, 1958.

ALEXANDER BICKS, United States District Judge.

[fol. 16]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER AND JUDGMENT APPEALED FROM—March 30, 1959

The plaintiff having regularly moved this Court for an order directing that judgment be entered dismissing the plaintiff's complaint, and said motion having duly come on to be heard before Hon. Gregory F. Noonan, United States District Judge on the 19th day of March, 1959,

Now, upon reading and filing the notice of motion dated March 3, 1959, the affidavit of Jacob Rassner, sworn to the 13th day of March, 1959, the stipulation dated October 30, 1958 and the order of Hon. Alexander Bicks, United States District Judge filed September 10, 1958, in support thereof, and Thomas H. Walker, Esq., attorney for the defendant having appeared but not opposed to said motion, and due deliberation having been had thereon, and the written memorandum of the Court having been filed herein, it is hereby

Ordered, that the second cause of action in the within cause be and hereby is discontinued without prejudice and without costs to either party and it is further

Ordered, that the first cause of action be and hereby is dismissed in accordance with the order of Hon. Alexander Bicks, United States District Judge filed September 10,

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cert. denied, 342 U. S. 816 (1951) (consequential damages recoverable for failure to provide maintenance and cure after termination of voyage when demanded). See also *Williams* v. *United States*, 228 F. 2d 129 (4th Cir. 1955), cert. denied, 351 U. S. 986 (1956).

1958, and the Clerk of this Court is hereby directed to mark his dockets and enter judgment accordingly.

Dated: New York, N. Y.,
March 30, 1959.

G. F. Noonan, U.S.D.J.
H. A. C.

Judgment Entered 3/31/59

Herbert A. Charlson, Clerk.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 94-288

JOHN M. KOSSICK, Plaintiff,

—against—

UNITED FRUIT COMPANY, Defendant.

EXCERPTS FROM INTERROGATORIES PROPOUNDED BY THE DEFENDANT TO BE ANSWERED BY THE PLAINTIFF UNDER OATH—Filed February 28, 1957

* * * * * * *

[fol. 18] 12. State specifically the manner and fashion in which it is alleged that the vessel or vessels were unseaworthy so as to cause injury, illness or aggravation of a pre-existing condition to the plaintiff with respect to each and every illness or injury alleged in the complaint.

* * * * * * *

14. Enumerate each and every failure on the part of the defendant to take any means or precautions for the safety of the plaintiff or failure to provide the plaintiff

with a reasonably safe place wherein to work, resulting in injury, illness or aggravation as alleged in the complaint.

• • • • • • •

[fol. 19] Thomas H. Walker, Attorney for Defendant, Office & P. O. Address, Pier 9, North River, New York 6, New York.

To:

Jacob Rassner, Esq., Attorney for Plaintiff, 15 Park Row, New York 38, N. Y.

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM ANSWERS TO INTERROGATORIES—
Filed May 31, 1957

• • • • • • • •

[fol. 21] 5. In the Fall of 1949, plaintiff became aware of an unusual degree of nervousness, tenseness and apprehension and tremors. In January of 1950, plaintiff noticed a lump in the region of his thyroid on the left side. Symptoms of nervousness and excitability, tenseness and apprehension continued to become worse until August of 1950, at which time the plaintiff was discharged from the [fol. 22] S. S. Cape Ann and the plaintiff was offered a master's certificate to go to the United States Public Health Service Hospital in Staten Island.

Prior thereto in between trips of approximately 20 to 30 days, the plaintiff was receiving treatment for his thyroid condition by a private doctor—Dr. Frick, 445 West 23rd Street, Borough of Manhattan, City of New York. Plaintiff had contracted with Dr. Frick to perform the necessary operation and furnish all post-operative medical treatment for the flat price of $350. Said price to include the hospitalization.

Plaintiff asked the defendant through its Medical Department, Captain MacCumber and George Halstead, the

port steward, to approve his receiving the medical and surgical treatment from Dr. Frick. The conferences were numerous and each time that this matter was taken up with the defendant through these parties, plaintiff was told that the maintenance as well as the cure would not be paid for by the defendant unless plaintiff went to the United States Public Health Service Hospital at Staten Island. Plaintiff repeatedly stated that he was willing to pay for his own medical treatment but that he did not wish to waive the maintenance because there was a probability that the convalescence following the operation might be extensive in point of time because of the symptoms which predated the operation, having continued for such a long period. Plaintiff stated that he did not wish to waive the maintenance under any circumstances even though he was willing to waive the cost of the said medical treatment. The defendant through all of these abovementioned persons represented to the plaintiff that if he waived his privilege of going to his own private doctor and instead went to the United States Public Health Service Hospital at Staten [fol. 23] Island for his treatment and operation, the defendant would be responsible for everything that happened and would make good any bad consequences or damage resulting from said treatment, thereby wrongfully preventing plaintiff from his choice of doctors.

The plaintiff repeatedly stated to all of the heretofore mentioned agents of the defendant that he had already had some very unpleasant experiences at the United States Public Health Service Hospital which made him shudder at the thought of going back there and specifically related the two experiences he had in mind. The first experience was in the year 1937, when the plaintiff went there with a nasal cold and before the plaintiff knew it and before the plaintiff could possibly get out of the hospital, he found himself being operated on for a sinus condition, which he was not even aware of having had and since that time the plaintiff has had all sorts of trouble with his nose which he had never had before. To this day, the plaintiff is convinced that that was an unnecessary operation and there was nothing he could do about avoiding it. There was no one he could talk to and obtain any sort of satisfaction. In

the same year, 1937, the plaintiff was sent to the same United States Public Health Service Hospital in Staten Island, having been referred there by the United States Public Health Service Hospital, Hudson and Jay Streets, where the plaintiff had received a most cursory examination by a specialist upon the complaint of the plaintiff that he was beginning to have tremors and nervousness. When this specialist touched his chest he immediately stated that the plaintiff had a thyroid condition which had to be corrected by surgery and immediately referred the plaintiff to the United States Public Health Service Hospital in Staten [fol. 24] Island. Upon his arrival there, the plaintiff was confined to a room for one solid period of three weeks, during which time he was never examined by anyone; was unable to obtain any sort of information or consultation and during which time he was compelled to share a room with another person by the name of Frank Atwood, a postal worker, who was suffering from active tuberculosis and who died two months later from that disease at a United States Tuberculosis Hospital in New York City, to which he was transferred.

All of these conversations merely resulted in reaffirmance of the premises of the defendant through these agents, that that was the only place that they would authorize treatment and that they guaranteed the results would be satisfactory and they would be responsible for any untoward or unexpected damages as feared. At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service Hospital but plaintiff became convinced that the defendants were making a separate contract to be responsible for anything that went astray as a result of plaintiff's treatment at the said hospital and in reliance on that representation, the plaintiff gave up his right to his own choice of doctors as an inducement to the defendant, so that the defendant would pay him maintenance. Plaintiff was fully aware that he had a right to maintenance, even though he chose his own doctor and hospital for treatment and was aware that he would be waiving the cost of the cure and medical treatment. This he was willing to waive, but he

was not willing to waive the maintenance which might be for an extended period of time, in view of the fact that the symptoms had lasted so long before the operation.

. . . . . .

[fol. 25]. 12. Plaintiff waives any claim of unseaworthiness.

. . . . . .

14. Plaintiff waives any claim of negligence with respect to a safe place wherein to work.

. . . . . .

[fol. 26]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN M. KOSSICK, Plaintiff,

—against—

UNITED FRUIT COMPANY, Defendant.

STIPULATION WAIVING UNSEAWORTHINESS AND JONES ACT CLAIMS—May 6, 1958

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the sole question for determination by the Court upon this motion is whether the complaint Answers to Interrogatories and examination before trial of plaintiff sets forth a cause of action in contract upon which relief may be granted.

It Is Further Stipulated and Agreed by and between the attorneys for the respective parties hereto, that for the purposes of this motion, plaintiff waives any claim or claims arising out of unseaworthiness or the Jones Act.

JACOB RASSNER, Attorney for Plaintiff

THOMAS H. WALKER, Attorney for Defendant

Dated: New York, New York, May 6, 1958

[fol. 27]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 65—October Term, 1959.

Argued November 18, 1959

Docket No. 25771

JOHN M. KOSSICK, Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, Defendant-Appellee.

Before: Magruder, Medina and Friendly, Circuit Judges.

OPINION—February 23, 1960

Appeal from an order, Alexander Bicks, Judge, dismissing a complaint on the ground that the claim sued upon was barred by the New York Statute of Frauds. 166 F. Supp. 571. *Affirmed.*

Jacob Rassner, New York, N. Y. (Thomas F. Frawley, New York, N. Y., on the brief), for plaintiff-appellant.

Eugene Underwood, New York, N. Y. (Francis I. Fallon and Burlingham, Hupper & Kennedy, New York, N. Y., on the brief), for defendant-appellee.

[fol. 28] MAGRUDER, Circuit Judge:

Appeal is here taken from an order of the United States District Court for the Southern District of New York dismissing an amended complaint which appellant filed against United Fruit Company. 166 F. Supp. 571. It was alleged that appellant was working as chief steward on a vessel belonging to the United Fruit Co.; that while so working he suffered an illness which was not claimed to be attributable to any negligence or breach of duty by the defen-

dant; that the shipowner had a maritime obligation to supply the seaman with "maintenance and cure"; that appellant had engaged the services of a private physician to treat his illness, but that the shipowner wanted the seaman to be treated free of charge at a United States Public Health Service Hospital at Staten Island, New York; that United Fruit Co. agreed, on or before August 28, 1950, that if the seaman would discharge his private physician and become a patient at such United States Public Health Service Hospital, "defendant would assume all the responsibility of any improper, inadequate or incompetent treatment of whatever nature the plaintiff received at the hospital, or for the consequences of any lack of due treatment and nursing care and would compensate the plaintiff for any damages or ill effects that he would suffer by reason of his discharging Dr. Frick and in place thereof becoming a patient of the United States Marine Hospital"; that in reliance upon such agreement by the shipowner appellant did in fact become a patient of the United States Public Health Service Hospital, Staten Island, New York, on August 28, 1950; that on the same day he suffered injuries by being chemically burned about the rectum when a strong colonic was negligently administered by personnel employed by the hospital; that by reason of the foregoing the plaintiff became totally and permanently disabled and suf-
[fol. 29] fered damages in the amount of $250,000, for which judgment against defendant was prayed.

As the district judge observed, these allegations were bottomed "on contract and not on unseaworthiness or the Jones Act"; that this was not an oversight by the plaintiff "but rather a stratagem to resuscitate a claim time barred under the Jones Act." 166 F. Supp. at 573.

The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law §31(2) that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement "[i]s a special promise to answer for the debt, default or miscarriage of another person."

Great reliance is placed by appellant upon the decision in *Union Fish Co.* v. *Erickson*, 248 U. S. 308 (1919), to the effect that a maritime contract cannot be nullified in an admiralty court by a State Statute of Frauds. We shall assume that *Union Fish Co.* v. *Erickson* is still the applicable law and that the decision therein has not been modified by subsequent decisions. Nevertheless it is obvious that it applies only to "maritime contracts." The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment. See *Pacific Surety Co.* v. *Leatham & Smith &c. Co.*, 151 Fed. 440 (C. A. 7th, 1907); *Clinton* v. *International Organization of Masters, &c.*, 254 F. 2d 370 (C. A. 9th, 1958). For all that appears in the complaint, it may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff [fol. 30] had been terminated. It really makes no difference whether this is so or not. All that remained was the performance by the shipowner of its undisputed obligation to supply maintenance and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. See *The Bouker No. 2*, 241 Fed. 831, 835 (C. A. 2d, 1917), cert. denied sub nom. *Jones* v. *Bouker Contracting Co.*, 245 U. S. 647 (1917). That took care of the obligation to furnish "cure." As to the obligation to furnish maintenance, it is true that the amended complaint also contained a second count alleging that defendant failed and refused to supply plaintiff with the expenses of his maintenance and cure. But in the order appealed from, this second cause of action was discontinued "without prejudice and without costs to either party"; and appellant makes no objection to this action by the trial judge.

A judgment will be entered affirming the order of the District Court.

[fol. 31]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN M. KOSSICK, Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, Defendant-Appellee.

JUDGMENT—February 23, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

[fol. 32] (File Endorsement omitted.)

[fol. 33] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 952—October Term, 1959

JOHN M. KOSSICK, Petitioner,

—vs.—

UNITED FRUIT COMPANY.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.